No. 88-124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LYNN L. BREININGER,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*
Association for Union Democracy, *et al.*

April 7, 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-124

LYNN L. BREININGER,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3, the Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen move the Court to grant them leave to file the accompanying brief as *amici curiae* in support of petitioner. Movants have secured the written consent of the petitioner, but respondent objects.

The Association for Union Democracy is a non-profit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, prominent educators in labor studies and labor law, and numerous union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

In the past, the Association has provided legal and other support to numerous workers who have been deprived of hiring hall referrals either arbitrarily, or in retaliation for their intra-union political activities. Indeed, the ability of union leaders to starve their opponents is one of the leading obstacles to democracy in construction unions, which are the principal users of hiring halls. The Association's experience leads it to conclude that members need the right to go to court in order to protect their rights to both work and dissent.

Teamsters for a Democratic Union ("TDU") is an organization of rank-and file members of the International Brotherhood of Teamsters who seek to reform their union and make it more effective and responsive to their needs as workers. Although most of TDU's members are full-time employees of a single employer, a significant number work out of hiring halls either in the trucking or construction industries. TDU members have first-hand experience both with union retaliation for the exercise of free speech rights within the union, and with the patent inadequacy of the National Labor Relations Board as a potential source of redress for such discrimination. TDU joins in filing this brief because if, as the lower courts held, members who have lost their jobs because of their intra-union political activity cannot go to court to protect themselves, the drive to reform and democratize the Teamsters union could be crippled.

Public Citizen is a public interest organization which was

founded in 1971 by Ralph Nader. Attorneys for Public Citizen frequently represent union members who have been unable to protect themselves from undemocratic practices without invoking judicial authority. Public Citizen has also found that the National Labor Relations Board is often unavailable as a practical matter for all of the workers who need its assistance, and so workers continue to need an independent judicial remedy for economic discrimination by their unions.

CONCLUSION

The Association for Union Democracy, Teamsters for a Democratic Union, and Public Citizen should be permitted to file the accompanying brief as *amici curiae* in support of petitioner.

Respectfully submitted,

Paul Alan Levy
(*Counsel of Record*)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*

April 7, 1989

TABLE OF CONTENTS

Page:

Table of Authorities ii

Interest of *Amici Curiae* 1

Statutory Provision Involved 1

Statement 2

Summary of Argument 3

ARGUMENT 4

I. Petitioner's Allegations That the Union Denied Him Hiring Hall Referrals in Retaliation for His Exercise of Free Speech Rights State a Claim Under the LMRDA. 4

II. Petitioner's Allegations of Arbitrary and Discriminatory Denial of Hiring Hall Referrals Under the Collective Bargaining Agreement State a Claim for Breach of the Duty of Fair Representation That May Be Pursued in Court. 13

Conclusion 17

TABLE OF AUTHORITIES

Cases **Page:**

Boilermakers v. Braswell,
388 F.2d 193 (5th Cir. 1968) 12

Boilermakers v. Hardeman,
401 U.S. 233 (1971) 10, 17

Bowen v. Postal Service,
459 U.S. 212 (1983) 14, 16

Communications Workers v. Beck,
108 S. Ct. 2641 (1988) 13, 14, 15, 17

Czosek v. O'Mara,
397 U.S. 25 (1970) 12, 16

Derringer v. Columbia Transportation,
866 F.2d 859 (6th Cir. 1989) 12

Detroy v. AGVA,
286 F.2d 75 (2d Cir. 1961) 5

Duncan v. Peninsula Shipbuilders Association,
394 F.2d 237 (4th Cir. 1968) 5, 9

Feltington v. IATSE Local 306,
605 F.2d 1251 (2d Cir. 1979) 12

Finnegan v. Leu,
456 U.S. 431 (1982) 10, 11

Franza v. Teamsters Local 671,
No. 88-7258 (2d Cir., February 14, 1989) 9

Hackenburg v. Boilermakers,
694 F.2d 1237 (10th Cir. 1985) 6

Page:

Hall v. Cole,
412 U.S. 1 (1973) 12

Harrison v. UTU,
530 F.2d 558 (4th Cir. 1975) 12

Hines v. Anchor Motor Freight,
424 U.S. 554 (1976) 14, 16

IBEW v. Foust,
442 U.S. 42 (1979) 12

Karahalios v. National Federation of Fed'l Employees, 109 S. Ct. 1282 (1989) 13, 16

Landry v. Sabine Independent Seamen's Association, 623 F.2d 347 (5th Cir. 1980) 12

Macaulay v. Typographical Local 13,
692 F.2d 201 (1st Cir. 1982) 6

McCraw v. Plumbers,
341 F.2d 705 (6th Cir. 1965) 12

Moore v. IBEW Local 569,
653 F. Supp. 767 (N.D. Cal. 1987) 9

Murphy v. Operating Engineers Local 18,
774 F.2d 114 (6th Cir. 1985) 9

Plumbers Local 100 v. Borden,
373 U.S. 690 (1963) 17

Quinn v. DiGiulian,
739 F.2d 637 (D.C. Cir. 1984) 12

Page:

Reed v. UTU,
109 S. Ct. 621 (1989) 10, 11

Sanabria v. ILA Local 1575,
597 F.2d 312 (1st Cir. 1979) 12

Sheet Metal Workers v. Lynn,
109 S. Ct. 639 (1989) 10, 11

Simmons v. Textile Workers Local 713,
350 F.2d 1012 (4th Cir. 1965) 12

Steele v. Louisville & Nashville RR,
323 U.S. 192 (1944) 13, 14, 15

Syres v. Oil Workers Local 23,
350 U.S. 892 (1955) 14, 15, 17

Taliaferro v. Schiro,
669 F. Supp. 763 (W.D. La. 1987) 9

Terry v. Teamsters Local 391,
863 F.2d 334 (4th Cir. 1988) 12

Vaca v. Sipes,
386 U.S. 171 (1967) 13, 14, 15, 16, 17

Vandeventer v. Operating Engineers Local 513,
579 F.2d 1373 (8th Cir. 1978) 9, 12

Wallace Corp. v. NLRB,
323 U.S. 248 (1944) 13, 14, 15

Page:

Statutes

Labor Management Relations Act,
29 U.S.C. §§ 151 *et seq.* 16

Section 301, 29 U.S.C. 185 16

Labor-Management Reporting and Disclosure Act of 1959,
29 U.S.C. §§ 401 *et seq.* ("LMRDA") ..... *passim*

Title I, 29 U.S.C. §§ 411 *et seq.* ..... *passim*
Section 101(a)(1), 29 U.S.C. § 411(a)(1) 8, 9
Section 101(a)(2), 29 U.S.C. § 411(a)(2) 5, 6
Section 101(a)(5), 29 U.S.C. § 411(a)(5) 4, 5, 6, 11
Section 102, 29 U.S.C. § 412 6

Section 609, 29 U.S.C. § 529 .....

National Labor Relations Act
29 U.S.C. §§ 151 *et seq* 15

Section 8(b), 29 U.S.C. § 158(b) 11
Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 15
Section 10, 29 U.S.C. § 160 15

Miscellaneous

BNA, *The Developing Labor Law* (2d ed. 1983) 15

NLRB, *Legislative History of the LMRDA* (1959) 7, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-124

LYNN L. BREININGER,
Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE ASSOCIATION FOR UNION DEMOCRACY, TEAMSTERS FOR A DEMOCRATIC UNION, AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* is set forth in the accompanying motion for leave to file brief as *amici curiae*.

STATUTORY PROVISION INVOLVED

In addition to the provisions cited in the Petition for a Writ of Certiorari, this case involves section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2), which provides:

FREEDOM OF SPEECH AND ASSEMBLY. — Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, and opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and contractual obligations.

STATEMENT

Petitioner, a member of respondent Local 6 of the Sheet Metal Workers International Association, alleges that his union improperly deprived him of employment opportunities by abusing its power as his collective bargaining representative to refer employees through its hiring hall. According to petitioner, respondent both failed to refer him out properly according to his position on the local's "out of work" list, and deliberately refused to refer him to employers that had specifically requested him by name.

Petitioner asserts that this conduct violated his rights in two separate ways. First, he contends that respondent discriminated against him because he exercised his statutory right to support the political opposition within the local, rather than the incumbent leaders, and that this conduct violated the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.§§ 401 *et*

seq. ("LMRDA"). Second, he argues that, even if respondent did not intend to retaliate against him for supporting the insurgents, its hiring hall practices deprived him of employment in an arbitrary manner, in violation of its duty of fair representation ("DFR").

The lower courts, however, held that neither of petitioner's claims could be pursued directly in court. The district court ruled that petitioner's allegations of discriminatory practices in the respondent's hiring hall set forth an unfair labor practice claim, but went on to hold that the National Labor Relations Board ("NLRB") had exclusive jurisdiction of such claims. The district court did not consider whether respondent's conduct violated the authorities on which petitioner had relied in his complaint. The court of appeals agreed with the district court that hiring hall discrimination was an unfair labor practice, and held that petitioner's use of the label "duty of fair representation" did not avoid the preemptive effect of the NLRB's exclusive jurisdiction. It also held that petitioner had not stated a violation of the LMRDA because he did not show that he had been "disciplined," a term that the court held is restricted to punitive actions that diminish membership rights. The court reasoned that because hiring hall referrals are available to non-members as well as members, loss of employment opportunities could not be considered to be the loss of a right enjoyed by virtue of union membership, and hence was not actionable under the LMRDA.

SUMMARY OF ARGUMENT

The question of whether the LMRDA requires a union to accord a member due process protections before depriving him of employment opportunities turns on the nature of the denial and other facts that are not well defined on the preliminary record of this case. But with respect to petitioner's claim that he was deprived of employment opportunities in retaliation for his

having exercised his right to support insurgent candidates for union office, there is no question that that is one of the prime abuses that Congress intended to correct when passing the LMRDA. The lower court's refusal to recognize a cause of action based on its view that economic retaliation based on the exercise of free speech rights does not deny "membership rights" was wrong both because the right to dissent is a membership right, and because the focus on denial of "membership rights" is not required by the statute.

Petitioner is also entitled to pursue his cause of action for breach of the duty of fair representation. That duty extends to hiring hall referrals, whereby a union exercises its power as the employees' exclusive bargaining representative, and the Court has long held that the duty is enforceable in court, whether the action is brought solely against the union or against the union as well as the employer.

ARGUMENT

I. Petitioner's Allegations That the Union Denied Him Hiring Hall Referrals in Retaliation for His Exercise of Free Speech Rights State a Claim Under the LMRDA.

A. At the outset, we recognize that there is a problem with petitioner's LMRDA claim. Both the complaint and the petition for a writ of certiorari characterized the LMRDA claim as being based on denial of hiring hall referrals in retaliation for petitioner's participation in an opposition group within the union and for his campaign work for an insurgent candidate for local union office. These activities are plainly protected by section 101(a)(2) of the Union Members Bill of Rights in the LMRDA, and their infringement would be actionable under section 102 of the LMRDA.

However, although the complaint invokes section 102, it never mentions section 101(a)(2). Instead, the only section of the Union Members Bill of Rights that is invoked in the complaint is section 101(a)(5), which forbids unions from imposing discipline on their members without first according them the due process protections of written specific charges, reasonable time to prepare a defense, and a full and fair hearing. Yet the complaint makes no suggestion that petitioner has been deprived of any of these due process protections.

The question of what kind of due process rights a union member has when he is denied hiring hall referral is a difficult one that may turn on the nature of the denial, the length of time over which it operates, and whether the union purports to be enforcing rules under which the union or its hiring hall is supposed to operate. Just to take the two extremes, it is difficult to believe that Congress would have intended that, whenever a union is asked to send a worker to a particular job for that day only, it must issue a written notice to all interested members, allow them time to prepare, and then hold a hearing before deciding which member is to be referred. On the other hand, assume that a union believes that one of its members has broken a rule (hypothetically, a perfectly reasonable rule such as one that forbids assaults on the hiring hall dispatcher), but decides that the punishment should be, not expulsion from the union or a $1,000 fine, but indefinite denial of the use of the hiring hall, which may cost the member far more than $1,000 in lost income. It is hard to believe that Congress would have intended to allow a union to evade the due process protections established in the LMRDA to protect members whom the union desires to punish by the tactic of confining itself to economic punishment. Indeed, in a series of cases, the lower courts have held that such claims may be pursued under section 101(a)(5). *E.g., Detroy v. AGVA*, 286 F.2d 75, 81 (2d Cir. 1961); *Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d 237, 239 (4th Cir. 1968). *See also Macaulay v.*

Typographical Local 13, 692 F.2d 201, 204 (1st Cir. 1982) (section applies when member alleges that he was arbitrarily singled out for punishment). *But see Hackenburg v. Boilermakers*, 694 F.2d 1237 (10th Cir. 1985).

In our view, however, the more important and more easily resolved LMRDA issue in this case is whether petitioner's claim of denial of referrals in retaliation for political activity is actionable under sections 101(a)(2) and 102 of the LMRDA. Although both the complaint and the petition specifically invoke section 609 of the LMRDA, which forbids unions from disciplining members in retaliation for the exercise of any of the rights provided by the LMRDA (including free speech rights), the petition is also clear that petitioner's LMRDA claim is predicated on retaliation for his political activities within the union. We agree with the view expressed by the Solicitor General, Brief in Support of Certiorari at 19 n.13, that petitioner's inartful phrasing of his Question Presented, and his citation of the wrong statutory provision in his complaint, should not bar the Court from considering whether the allegations in his complaint state a cause of action under the LMRDA.

It is entirely proper for the Court to decide this case under section 101(a)(2) because the ruling of the court below, precluding petitioner from pursuing his claim of retaliation under the LMRDA, was based on a wooden distinction between loss of "membership rights" and other injuries. Under that ruling, the LMRDA only protects members against union actions that deprive them of membership rights, a rationale that would apply equally to claims under sections 101(a)(2), 101(a)(5) and 609.

Before turning to an analysis of the statute and of this Court's cases construing it, we put forward a simple hypothetical that points up the inadequacy of the lower court's reasoning. Even respondent, we trust, would concede that a union member who is physically beaten at the behest of the union president, for having criticized the president at a union meeting, may claim the

protection of the LMRDA. Title I protects a member against such reprisals even though a punch in the nose does not alter the member's status as a member of the union. This is true even though union membership rights do not include a guarantee that a worker will not suffer a broken nose. The reason why there is a violation of Title I in these circumstances is that the member's nose was broken by agents of the union leadership *because* he exercised the membership right of expressing his views about the union's leadership.

The same reasoning applies to a member who is deprived of hiring hall referrals because he exercised his free speech rights, even though union membership rights do not include a guarantee of actual employment or of the availability of referrals. Indeed, the discussions of the purposes of the Bill of Rights on the floor of the Senate show beyond peradventure that Congress intended to forbid the very sort of employment-related reprisals that are alleged in this case. Thus, as Senator McClellan stated when he introduced the Union Members Bill of Rights as a floor amendment to the LMRDA, a "union man is not protected by effective law which he can use against beatings and tortures and job-loss as reprisals for assembling [and] for speaking up in meetings . . .." II NLRB, *Legislative History of the LMRDA* 1098 (1959). ("*Legis. Hist.*") Senator McClellan further explained that Congress needed to

> prescribe and define by law what the rights of union members are, place in them by the democratic process the power to secure those rights, and protect them in their efforts to do so *from reprisals of any kind* . . .. Without such protection, other provisions of law may be of little benefit and meaningless. Without such protection in the exercise of his legitimate rights, the records of our committee's investigations show over and over again that a rank-and-file member dare not

> risk any opposition to a corrupt or autocratic leadership. *If he does so*, he may be beaten, his family threatened, his property destroyed or damaged, *and he may be forced out of his job* — all of these things can happen and have happened.
>
> II *Legis. Hist.* 1098 (emphasis added).

Having introduced his Bill of Rights amendment, Senator McClellan proceeded to explain what he intended to accomplish by each subsection of the amendment. Section 101(a)(2), he said, was addressed in part to the problem that his Select Committee had encountered of union members who were afraid of the consequences of speaking out:

> They are afraid of reprisals against them. Two waitresses from Chicago testified that it required six months to get a job. Union officials go around and interfere. They say to a prospective employer, "If you hire this person, you will have labor trouble." They cannot come here and tell the truth without risking reprisals.
>
> This provision is for the benefit of the working people, the people from whom some of these parasites draw the lifeblood which courses through their veins.
>
> II *Legis. Hist.* 1103.

Nor did the opponents of Title I dispute that it would apply to employment-related reprisals. Remarking on the portion of the original Bill of Rights that would have given the Secretary of Labor the power to sue for violations of Title I, Senator Kennedy objected to section 101(a)(1), which gave members "equal rights and privileges within such organization," on the ground that it involved

> putting the Secretary of Labor into the adjustment of matters such as equal rights and privileges within a labor organization. I should think that would involve the Secretary of Labor in criminal offense procedures, *seniority disputes*, and every other matter as to which any member of a union may feel *he was discriminated against by union officers or by his employer* while he was a member of his union.
>
> II *Legis. Hist.* 1113 (emphasis added).

Notwithstanding these objections, the Senate adopted the Bill of Rights, which, with modifications not relevant here, was enacted into law.[1]

Accordingly, most courts have held that employment-related reprisals for free speech activity are forbidden by and actionable under Title I. *Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 121-123 (6th Cir. 1985); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1378-1379 (8th Cir. 1978); *Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d 237, 239 (4th Cir. 1968); *Taliaferro v. Schiro*, 669 F. Supp. 763, 776 (W.D. La. 1987); *Moore v. IBEW Local 569*, 653 F. Supp. 767, 769-772 (N.D. Cal. 1987). *See also Franza v. Teamsters Local 671*, No. 88-7258 (2d Cir., February 14, 1989), Opin. at 16. Even the AFL-CIO has recognized that

---

[1] As enacted, the Bill of Rights is enforceable only by suits of individual members, not by the Secretary of Labor, as the McClellan amendment had provided. Senator Kennedy's remarks nevertheless support our argument that the Bill of Rights protects members against employment-related reprisals, because they show the Senate's understanding of the meaning of Section 101(a)(1), although the enforcement mechanism was changed.

> one of the principal reasons that Title [I] was enacted was to protect dissident members from economic reprisals by unions .... [A]n allegation that a union has sought to blacklist or procure the discharge of a dissident member clearly states a claim for relief under Title I.
>
> *Reed v. UTU*, No. 87-1031 (S. Ct.), Brief of AFL-CIO as *Amicus Curiae*, at 18.

Thus, it is scarcely surprising that the court below is the *only* court of appeals to hold that employment-related reprisals for free speech activity are not actionable under the LMRDA.[2]

This Court's decision in *Sheet Metal Workers v. Lynn*, 109 S. Ct. 639 (1989), compels the conclusion that the reprisals alleged in this case are actionable under the LMRDA. In that case, as here, the union argued that a union member who had been deprived of his employment (there, as a union officer) because of his free speech activity had not been deprived of any rights enjoyed under Title I because he was still permitted to come to union meetings and remained a member of the union. This Court squarely rejected the argument because retaliatory reprisals force members to choose between their free speech rights and their jobs. *Id.* at 644-645. Moreover, the Court reasoned, the case was unlike *Finnegan v. Leu*, 456 U.S. 431 (1982), where the Court permitted a newly elected union president to remove his defeated predecessor's confidential and policy-making assis-

[2]In *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), the Court noted that the employee there was alleging intra-union discipline rather than discrimination in job referrals. Contrary to the view of the court below, Pet. App. A3, this Court did not hold that, if petitioner's claim had been based on union discrimination in job referrals, the LMRDA would not have applied or its application would have been preempted by the jurisdiction of the NLRB.

tants because the democratic benefits of ensuring the ability of the elected officers to vindicate the choice of the union electorate outweighed the cost in chilling the free speech rights of those who supported the loser. *Lynn*, 109 S. Ct. at 644.

This case is *a fortiori* from *Lynn*. As in *Lynn*, if a union official can deprive an insurgent member of employment opportunities through the union hiring hall, that would force the member to choose between his rights and his job. And, as in *Lynn*, there are no special reasons of the kind found in *Finnegan* that would warrant the Court in allowing such reprisals in order to assure that democratically elected union officials can carry out their mandates. Accordingly, petitioner has a valid claim that he was denied employment opportunities in retaliation for his exercise of free speech rights, in violation of sections 101(a)(2) and 102 of the LMRDA.[3]

In closing this section, however, we wish to express our concern about the reference to "membership rights" in *Finnegan* and *Lynn*. It is possible, as the Court did in *Lynn*, to define away the requirement that membership rights be implicated by concluding that Title I rights *are* membership rights, and thus membership rights are denied whenever Title I rights are denied. It seems far more straightforward, however, and less likely to lead the lower courts into thickets of verbal manipulation, for the Court simply to say that section 102 of the Act provides a cause of action whenever members are deprived of Title I rights, without erecting the extra requirement, for which there is no basis in the language of the statute, its legislative history, or its

[3]There is no basis for holding that the NLRB's authority preempts employees' right to enforce the LMRDA. To the contrary, as this Court said in *Reed v. UTU*, 109 S.Ct. 621, 629-630 (1989), "Title I of the LMRDA was a response to the perception that the NLRA, including the 8(b) provisions defining unfair labor practices by labor organizations, had failed to provide the necessary protection for the free speech and other rights of union members that Congress considered essential to the democratic operation of unions."

purposes, that a way be found to characterize the rights at issue as "membership" rights.

B. Petitioner's retaliation claim under the LMRDA would also constitute a DFR claim — *i.e.*, a union would plainly breach its DFR by exercising its power as an exclusive bargaining representative to the employee's detriment in retaliation for the employee's political activities. However, the LMRDA claim is generally a more potent tool for enforcing the retaliation claim, because punitive damages are generally held to be available in LMRDA cases, but not in DFR cases,[4] because attorney fees are a standard form of relief in LMRDA cases, although some courts do not allow them in DFR cases,[5] and because the lower courts are more likely to recognize the right to a jury trial in LMRDA cases than in DFR cases.[6] Indeed, it is for these reasons that *amici's* principal goal in this case is to preserve the ability of dissident employees, who lose employment opportunities in retaliation for their intra-union political activities, to pursue their claims under the LMRDA.

However, even if petitioner is unable to prove his retaliation

---

[4]*Compare IBEW v. Foust*, 442 U.S. 42 (1979), *with id.* at 47 n.9; *Quinn v. DiGiulian*, 739 F.2d 637, 650-651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers*, 579 F.2d 1373, 1380 (8th Cir. 1978); *and Boilermakers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968).

[5]*Compare Hall v. Cole*, 412 U.S. 1 (1973), *and Landry v. Sabine Indep. Seamen's Ass'n*, 623 F.2d 347, 350 (5th Cir. 1980), *with Harrison v. UTU*, 530 F.2d 558, 564 (4th Cir. 1975), *and Sanabria v. ILA Local 1575*, 597 F.2d 312 (1st Cir. 1979). *But see Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) (DFR plaintiff may recover from union damages attributable to "the difficulty and expense of collecting from the employer" that is caused by the union's refusal to pursue the grievance).

[6]*Compare Quinn v. DiGiulian*, 739 F.2d 637, 645-646 (D.C. Cir. 1984), *Feltington v. IATSE Local 306*, 605 F.2d 1251, 1257-1258 (2d Cir. 1979), *and Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 1018 (4th Cir. 1965), *with Terry v. Teamsters Local 391*, 863 F.2d 334 (4th Cir. 1988), *and Derringer v. Columbia Transportation*, 866 F.2d 859 (6th Cir. 1989). Ironically, the Sixth Circuit is the only circuit that denies a jury trial in LMRDA cases. *McCraw v. Plumbers*, 341 F.2d 705, 709 (1965).

claim, he may still proceed on his DFR claim. That is because the DFR extends to "arbitrary" and "perfunctory," as well as to retaliatory union conduct, *Vaca v. Sipes*, 386 U.S. 171, 191, 194-195 (1967), and petitioner's complaint alleges that the denial of referrals was "arbitrary" as well as discriminatory and in bad faith. Pet. App. A20. Moreover, the DFR serves a useful function even in the case of the dissident employee who suspects that he is the victim of retaliation, because the practical effect of the DFR is often to force the union to articulate a reason for its actions, which can then be evaluated in determining whether the real reason was a retaliatory motive. Finally, the DFR may be asserted by employees who, whether by their own election or by reason of exclusion from the union, have not obtained union membership. Accordingly, we urge the Court to consider the viability of petitioner's DFR claim regardless of whether it upholds his LMRDA claim, and in the remaining pages of this brief we address that issue briefly.

II. Petitioner's Allegations of Arbitrary and Discriminatory Denial of Hiring Hall Referrals Under the Collective Bargaining Agreement State a Claim for Breach of the Duty of Fair Representation That May Be Pursued in Court.

Over the past forty-five years, in cases beginning with *Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944), and *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), and continuing to last Term, *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988), the Court has repeatedly held that the DFR is implicit in the provisions of the federal private sector labor laws. *See also Karahalios v. National Fed'n of Fed'l Employees*, 109 S. Ct. 1282 (1989) (public sector unions' DFR is explicitly assigned to federal agency for enforcement). These laws encourage employers to recognize unions as the collective representatives of

employees, and extinguish the right of employees to strike individual bargains governing the terms and conditions of employment where those bargains are inconsistent with the terms on which the employer and the collective bargaining representative have agreed. The Court has reasoned both that the right to bargain as an exclusive representative imposes a duty that is fiduciary in nature to represent those employees fairly and impartially, and that the statutory extinguishment of the right to contract on an individual basis would raise serious constitutional questions were there not a concomitant statutory duty to use that power fairly. *E.g., Wallace Corp., supra*, 323 U.S. at 255-256; *Steele, supra*, 323 U.S. at 198-199.

There should be no question that the DFR extends to the arbitrary denial of hiring hall referrals, as well as to other misuse by a union of its authority as an exclusive bargaining representative. Although all of the cases that this Court has thus far considered involved the union's exercise of its exclusive power over the processing of grievances (including the conduct of arbitration hearings), *e.g., Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1983), or the negotiation of the terms of employment in collective bargaining agreements, *e.g., Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988), there is no reason why the arbitrary exercise of exclusive union authority over a hiring hall should be treated any differently.

Indeed, the reasons for applying the DFR are at least as strong in hiring hall cases such as this as in grievance or negotiation cases. After all, in the grievance situation the complaint is that the employee believes that he has been wronged by the employer and that the union has failed to help him obtain redress; in the negotiation situation the employee presumably wants something from the employer, and the union has failed to try to get it for him.

But here employers actually requested petitioner by name, as the collective bargaining agreement permits, and petitioner alleges that the union has positively interfered with the consummation of the bargain that the employee has obtained. The reasons for inferring the DFR cause of action recognized in *Steele* and *Wallace* thus apply with as much force to cases such as this one as they would if the union were either conniving with or acquiescing in an employer's decision to prevent certain employees from being employed.[7]

The Court has also held that the DFR may be enforced by filing suit in court, even though the right at issue is derived from the National Labor Relations Act ("NLRA") and even though the NLRB normally has exclusive jurisdiction to enforce the NLRA. This right to go to court was recognized in the early DFR cases, such as *Steele* and *Syres*. Subsequently, the Court held in *Vaca* that the NLRB's recognition of the DFR as an unfair labor practice that violates section 8(b)(1)(A) of the NLRA, and that is litigable before the Board in a proceeding under section 10 of the NLRA, did not supersede the Court's earlier recognition of the individual employee's cause of action to enforce the DFR by suing in court. The Court has followed this holding ever since, including in last Term's decision in *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988).[8]

---

[7]The district court characterized the hiring hall in this case as non-exclusive, relying on the fact that members may solicit their own employment. Pet. App. A5-A6. Whether or not this is an accurate use of the term "non-exclusive," the collective bargaining agreement requires the employer to look to the union for referrals, even of those employees requested by name, unless enough workers are not provided within 48 hours, Jt. App. 29, 55, 57, and this exclusive authority as the worker's collective representative must, under the DFR, be exercised fairly.

[8]As with the DFR generally, the Board's treatment of hiring halls vacillated considerably before it took its current form, *see* II BNA, *The Developing Labor Law* 1396 n.220 (2d ed. 1983), and the belated erection of NLRB protections for employees arbitrarily denied employment should not supersede the application of the DFR to these cases.

Neither the lower court nor respondent, in its opposition to the petition for a writ of certiorari, gave any reason why *Vaca* and *Beck* ought not to apply to fair representation cases such as this one. Nonetheless, one might argue that this hiring hall case differs from the typical "hybrid" DFR claim, in which the employee is aggrieved by the union's abuse of its power over the grievance procedure, and he sues both the union for breach of the DFR and the employer for breach of a collective bargaining agreement. *E.g., Hines v. Anchor Motor Freight, supra; Bowen v. Postal Service, supra.* Under this theory, it could be argued that because one of several reasons given in *Vaca* for allowing DFR claims to be pursued in Court — that it made no sense to relegate the claim against the union to the NLRB, while the contractual claim against the employer had to be pursued in court under section 301 of the Labor-Management Relations Act — was not present, there is no need for a court remedy. *See Karahalios, supra*, 109 S. Ct. 1282.

But DFR cases in the grievance-administration category may be brought solely against the union, as this Court recognized in *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970); indeed, *Vaca* was filed solely against the union. Moreover, DFR cases in the contract negotiation category will normally be brought solely against the union, because the problem is not a violation of the contract, but the terms that the union has agreed to put in it. Yet such cases may be pursued in federal court just as the more common hybrid cases are. But, more fundamentally, even hiring hall cases may be brought against employers as well as unions, where, for example, the employer and the union conspire to violate both the referral procedures and the collective bargaining agreement, to the detriment of a dissident union member. Thus, although this case has been filed against the union alone, there is no reason to make an exception to the general rule, which allows DFR cases to be pursued in court, so that hiring hall DFR cases could be pressed only by the General Counsel of the NLRB,

whose decisions not to prosecute are virtually unreviewable.

Instead of articulating a reason for carving out an exception to *Vaca*, both respondent and the lower courts invoked the decision in *Plumbers Local 100 v. Borden*, 373 U.S. 690 (1963), which they cite for the propositions that any claim of discriminatory hiring hall procedures is arguably an unfair labor practice and that the NLRB's jurisdiction over unfair labor practices ousts both federal and state courts of jurisdiction. But the only question squarely presented in *Borden* was whether a state court could apply state law to such cases, and that is the proposition for which it is normally cited. *E.g., Boilermakers v. Hardeman*, 401 U.S. 233, 240 (1971). Although *Borden* does contain some broad language about both state and federal jurisdiction, the Court never considered whether the federal DFR could be enforced in such cases. To the extent that there may be some inconsistency between dicta in *Borden* about the impact of NLRB jurisdiction on federal as well as state jurisdiction, and the long line of this Court's cases running from *Syres* through *Beck* which recognize federal court jurisdiction to enforce the DFR, it would do far more violence to the fabric of contemporary federal labor law to curtail the *Syres* and *Beck* line of authority than to limit *Borden* to the state preemption issue that was presented there.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*
Association for Union Democracy,
et al.

April 7, 1989